BLANK
PAGE

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
SEP 18 1965
JOHN F. DAVIS, CLERK

No. 428

IN THE

Supreme Court of the United States

October Term, 1965

R. C. WETHERALL, JR. AND PAUL PRICE

Appellants

v.

THE STATE ROAD COMMISSION OF WEST VIRGINIA, A CORPORATION, AND BURL A. SAWYERS, AS STATE ROAD COMMISSIONER,

Appellees

ON APPEAL FROM THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

APPELLANTS' BRIEF IN OPPOSITION TO APPELLEES' MOTION TO DISMISS FOR LACK OF JURISDICTION

CARNEY M. LAYNE
638 Fifth Avenue
Huntington, West Virginia

CHARLES W. YEAGER
608 Kanawha Valley Building
Charleston, West Virginia

JAMES W. ST. CLAIR
523 Seventh Street
Huntington, West Virginia
Attorneys for Appellants

JARRETT PRINTING COMPANY, CHARLESTON, W. VA.

BLANK PAGE

INDEX

Page

STATEMENT OF THE CASE ---------- 1

ARGUMENT ---------- 3

I. APPELLEES' ASSIGNED GROUNDS FOR DISMISSAL ARE WITHOUT MERIT AND ARE REFUTED BY THE RECORD ---------- 3

1. The Judgment As To Appellant Wetherall Does Not Rest On Any Adequate Non-Federal Basis, And This Contention Of Appellees Has No Application to Appellant Price ---------- 3

2. The Federal Questions Were Timely And Properly Raised And Were Passed On By The Trial Court ---------- 5

II. APPELLEES' SUGGESTIONS AS TO REMEDIES ARE WITHOUT MERIT ---------- 6

1. Appellees' Suggestion Of Presentation By Appellants Of Claim To The Attorney General For Consideration And Possible Recommendation To The State Legislature As A Moral Obligation Of The State Is Not A Judicial Remedy And Is Not A Substitute For Due Process Of Law ---------- 7

2. The Remedy By Mandamus As Appellees Suggest Pro Hac Vice On This Motion To Dismiss, Has Already Been Ruled Upon By The Trial Court And Decided Adversely To Appellants-- 8

CONCLUSION ---------- 11

APPENDIX A Rule 19(a), Necessary Joinder of Parties, West Virginia Rules of Civil Procedure------ 1a

CITATIONS

CASES: Page

Ickes v. *Fox*, 300 U.S. 82, 96 ---- 2
Staub v. *Baxley*, 355 U.S. 313 ---- 3, 4
Sauffront v. *La Compagnie Des Sucreries*, 217 U.S. 475 4
McArthur v. *Scott*, 113 U.S. 340, 386 ---- 4
Lawrence v. *State Tax Commission*, 286 U.S. 276 ---- 4, 8
Wolfe v. *North Carolina*, 364 U.S. 177 ---- 4
N.A.A.C.P. v. *Alabama*, 357 U.S. 449 ---- 4
Vinson v. *Home Insurance Co.*, 123 W.Va. 522 ---- 4
U. S. v. *Dept. of Revenue of State of Illinois*, 191 F. Supp. 723 ---- 4
Abie State Bank v. *Bryan*, 282 U.S. 765 ---- 4
Enterprise Irr. Dist. v. *Farmers Mutual Canal Co.*, 243 U.S. 157 ---- 4
Raley v. *State of Ohio*, 360 U.S. 423 ---- 5
Slagle v. *Ohio*, 366 U.S. 259 ---- 5
Land v. *Dollar*, 330 U.S. 731, 738 ---- 8

FEDERAL CONSTITUTIONAL PROVISION:
Section 1, Fourteenth Amendment ---- 6

STATE CONSTITUTIONAL PROVISION:
Section 35, Article VI, Constitution of West Virginia ---- 2, 6, 9

STATE STATUTES:
Code of West Virginia, 1931, As Amended:
Chapter 14, Article 2, as amended by 1953 Acts, Regular Session, Chapter 18, p. 109 ---- 7
Chapter 17, Article 2A, Section 8(5) ---- 10
Chapter 17, Article 4, Section 5 ---- 10

STATE RULES OF CIVIL PROCEDURE:
Rule 17(a) ---- 3
Rule 19(a) ---- 4
Rule 57 ---- 9

MISCELLANEOUS:
2 Federal Practice and Procedure, Barron & Holtzoff, Sec. 482, p. 6 ---- 4

No. 428

IN THE

Supreme Court of the United States

October Term, 1965

R. C. WETHERALL, JR. AND PAUL PRICE

Appellants,

v.

THE STATE ROAD COMMISSION OF WEST VIRGINIA, A CORPORATION, AND BURL A. SAWYERS, AS STATE ROAD COMMISSIONER,

Appellees

ON APPEAL FROM THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

APPELLANTS' BRIEF IN OPPOSITION TO APPELLEES' MOTION TO DISMISS FOR LACK OF JURISDICTION.

STATEMENT OF THE CASE

Appellees, in both the statement of the case and in the argument contained in their motion to dismiss, have made statements concerning the employment agreement between Appellants Wetherall and Price which are *false, misleading and wholly beyond the record of the case.* They falsely and derogatorily characterize the agreement as "clandestine" and the transaction as a "subterfuge" and a "disguise"; they state that by "various strategems" Appellants "conspired" etc.; they falsely denominate the construction of the dam as "extra work". (Motion to Dismiss,

pp. 1, 3) These statements are unwarranted on this appeal, and serve only to confuse the grave issues before this Court. The employment agreement by Appellant Price engaging Appellant Wetherall to supervise the project was a legitimate agreement and that Appellant Wetherall was supervisor on the project was well known to all of Appellees' agents concerned therewith. Their statement that the dam construction was "extra work" is *patently false* as appears from the dam and roadway contract and the part thereof concerned with building the dam and entitled "Technical Specifications, Castleman Run Lake No. 1" (Jurisdictional Statement, pp. 9, 10; Appendix I thereto, p. 32a).

To briefly restate the case, the complaint shows, and for jurisdictional purposes here as well as on Motion to Dismiss in the Trial Court, it must be taken as true, *Ickes* v. *Fox*, 300 U.S. 82, 96, that by arbitrary action of the State Road Commissioner under color of office and without authority, the Road Commissioner refused to abide by the patent terms of the contract as to payment for the dam construction; that after the completion and acceptance of the dam, he deducted the payments already made therefor by monthly estimate from other monies still acknowledgedly due the contractor for roadway construction, and refused to audit the claim for payment of $20,847.75 representing Appellants' work and materials incorporated into a public dam. *This is the core of the action.*

Appellants' complaint was for declaratory judgment to have the Court interpret the contract and establish Appellants' rights, and sequentially to enforce them by compelling the Road Commissioner to perform his statutory duty. Appellees met Appellants' charges with a Motion to Dismiss on the ground that the proceeding was an action against the State of West Virginia and prohibited by Section 35, Article VI of the State Constitution. As to Wetherall it assigned the further ground that he was not a party to the contract with Appellees and had no standing in Court.

Both Appellants were turned out of the State Courts without any interpretation of the contract, which was *solely a question of law.* We note that in Appeal No. 144, *Howard Price d/b/a etc.* v. *State Road Commission et als* now pending in this court, in similar proceeding the Appellant therein was turned out of Court on the ground there existed a *controversy of fact.*

ARGUMENT

I.

APPELLEES' ASSIGNED GROUNDS FOR DISMISSAL ARE WITHOUT MERIT AND ARE REFUTED BY THE RECORD

The grounds assigned by Appellees in support of their Motion to Dismiss are: (1) That the judgment rests on an adequate non-federal basis; and (2) That the federal questions sought to be reviewed were not timely or properly raised, and were not expressly passed on.

1. The Judgment As To Appellant Wetherall Does Not Rest On Any Adequate Non-Federal Basis, And This Contention Of Appellees Has No Application To Appellant Price

Appellees allege as the basis for this first ground that Appellant Wetherall, *not being a party to the contract with Appellees,* was dismissed because he was not a "real party in interest" under Rule 17(a) of the State Rules of Civil Procedure and not a proper party plaintiff. The Trial Court in its opinion so held. Whether this ground is an adequate non-federal ground is a question of federal law, and this Court is not concluded by the view taken by the state court. *Staub* v. *Baxley,* 355 U.S. 313. Appellant Wetherall instituted the suit as a plaintiff because Appellant Price, the party contracting with Appellees, had theretofore refused to institute suit. Appellant Price who was made a defendant, then *asked to be made a co-party plaintiff and also filed a cross bill* seeking the exact same relief as sought by Appellant Wetherall. The situation of the parties

is within the principle enunciated in *Sauffron* v. *La Compagnie Des Sucreries*, 217 U.S. 475, and *McArthur* v. *Scott*, 113 U.S. 340, 386, and in view thereof the non-federal ground was without any fair or substantial support. *Staub* v. *Baxley*, 355 U.S. 313; *Lawrence* v. *State Tax Commission*, 286 U.S. 276; *Wolfe* v. *North Carolina*, 364 U.S. 177; *N.A.A.C.P.* v. *Alabama*, 357 U. S. 449. The procedure followed by Appellants in the trial court is within the principle of the only known West Virginia decision on the subject. *Vinson* v. *Home Insurance Co.*, 123 W.Va. 522 (1941). It conforms to the principle set forth in 2 Federal Practice and Procedure, Barron & Holtzoff, Sec. 482, p. 6. It is sanctioned by Rule 19(a) of the West Virginia Rules of Civil Procedure (Appendix A). It is four square with *U.S.* v. *Dept. of Revenue of State of Illinois*, 191 F. Supp. 723.

Further, Appellant Wetherall's complaint alleges, and on Motion to Dismiss it must be taken as true, that he supervised the dam work, and that the amount of his compensation was tied directly to that amount which was to be received by Appellant Price from Appellees. Accordingly, the work which was incorporated in the public dam and was being taken without compensation, was, to the extent of 90%, Appellant Wetherall's property, *whether he was a contracting party or not.* After an objection on federal grounds is raised, the jurisdiction of this Court is plain if the non-federal ground is *not of sufficient breadth to sustain the judgment without any decision on the federal ground. Abie State Bank* v. *Bryan*, 282 U.S. 765, *Enterprise Irr. Dist.* v. *Farmers Mutual Canal Co.*, 243 U.S. 157. It is apparent the judgment also required decision on the federal ground, and accordingly even as to Appellant Wetherall did require a decision on the federal ground.

Appellees' contention on this ground has no application whatsoever to the Appellant Price, who was a party to the contract and it accordingly cannot and does not purport to affect the jurisdiction of the appeal as to Appellant Price.

2. The Federal Questions Were Timely And Properly Raised And Were Passed On By The Trial Court

Appellees' second ground is refuted by the record. On the Motion to Dismiss in the Trial Court, no responsive pleading was allowed under the State Rules of Civil Procedure. The federal questions were *not evoked until the filing of Appellees' Motion to Dismiss* and were raised by Appellants in their argument in opposition thereto (Jurisdictional Statement, p. 7; Appendix F thereto, Order Certifying Existence of Federal Questions, p. 19a). The timeliness of the raising of the federal questions and its insistance was fully in accord with the requirements of *Raley* v. *State of Ohio,* 360 U.S. 423, and *Slagle* v. *Ohio,* 366 U.S. 259 cited by Appellees.

The *raising of* the federal questions is noted in:

(1) The final order of the Trial Court entered May 21, 1964, granting Appellees' Motion to Dismiss (Jurisdictional Statement, p. 8; Appendix D thereto, p. 11a). This was the *first* instrument to become part of the record following the argument on the motion, and under the Rules of Civil Procedure, the *earliest opportunity* at which Appellants could have noted on the record the raising of the federal questions.

(2) The Assignment of Errors contained in Appellants' Petition to the Supreme Court of Appeals of West Virginia (Jurisdictional Statement, p. 8; Record, p. 28).

(3) The Trial Court's Order *Certifying Existence of Federal Questions* (Jurisdictional Statement, pp. 8, 9; Appendix F thereto, p. 19a), wherein the Trial Court noted:

> "... that in *arguments made in this Court* on behalf of the plaintiff and on behalf of the cross-claimant, *upon the motion to dismiss* by the defendants, the State Road Commission of West Virginia, a corporation, and Burl A. Sawyers, State Road Commissioner, *it was insisted and relied upon by said plain-*

tiff and cross-claimant, that the application of Section 35, Article VI of the Constitution of West Virginia, to this case would deprive plaintiff and cross-claimant of their property without due process of law contrary to Section 1 of the Fourteenth Amendment to the Federal Constitution . . ." (Italics supplied)

The *passing upon* such federal questions by the Trial Court is evidenced by:

(1) The Trial Court's final Order granting Appellees' Motion to Dismiss; and

(2) Its Order Certifying the Evidence of Federal Questions, all as referred to above.

Appellees complain (Motion to Dismiss, p. 6) that Appellants' complaint contains no mention of the federal questions. Manifestly not, for it was only upon the filing of Appellees' Motion to Dismiss asking the application of Section 35, Article VI of the State Constitution and contending the proceeding was an action against the State of West Virginia, that invoked the federal questions.

We submit Appellees' assignment of this supposed ground for dismissal of this appeal is conclusively refuted by the record.

II.

APPELLEES' SUGGESTIONS AS TO REMEDIES ARE WITHOUT MERIT

In their Motion to Dismiss (pp. 3, 4, 5), Appellees made the same two contentions as were made by them in their Motion to Dismiss in Appeal No. 144, October Term, 1965, styled *Howard Price dba Howard Price and Company* v. *the State Road Commission, et als,* now pending before this Court. Appellees suggest that: (1) Appellants follow the procedure provided by state statute for the presentation

before the State Attorney General, of a claim against the State as a *moral obligation* of the State; and (2) That Appellants might institute a mandamus *to compel* Appellees to condemn their property, as incorporated in the public dam, under the eminent domain statutes.

1. Appellees' Suggestion Of Presentation By Appellants Of Claim To The Attorney General For Consideration And Possible Recommendation To The State Legislature As A Moral Obligation Of The State Is Not A Judicial Remedy And Is Not A Substitute For Due Process Of Law

It should be noted at the outset that the statute cited (Chapter 14, Article 2, Code of West Virginia, 1931, as Amended by Act of the West Virginia Legislature, Regular Session 1953, Chapter 18; p. 109; Michie's West Virginia Code of 1961, Serial Sections 1143 et seq., p. 705) relating to claim procedure before the Attorney General *expressly excludes* any claim:

> "7. With respect to which a proceeding may be maintained by or on behalf of the claimant in the Courts of the State".

Thus all other considerations aside, it is apparent that Appellees' suggestion begs the question as to whether Appellants should be provided a judicial forum in order to enforce their rights, for by the very terms of the statute, the procedure cannot be availed of if a judicial remedy is proper. We further note that Appellees' subsequent argument that a mandamus would lie, is *wholly inconsistent* with this argument of the availability of the claims procedure.

This statute provides for the presentation of claims to the State Attorney General, *who appears here as counsel for Appellees,* to consider and hear evidence, if need be, to the end, *in his discretion, he may* recommend to the Legislature that a claim be recognized as a *moral obligation of the State,* and for which the Legislature *may, in its discretion,* make some appropriation for its satisfaction.

It has been held insofar as federal officials are concerned, that in the case of abuse of power of office, a claimant will not be relegated to a Court of Claims. *Land* v. *Dollar,* 330 U.S. 731, 738. The complaint herein shows that the Road Commissioner, after honoring the patent terms of the contract and paying for the dam construction on the monthly estimates, *upon the completion and acceptance of the work, reversed his position, ignored the contract, and arbitrarily deducted the monies* paid for the dam construction from monies acknowledgedly still due the contractor for roadway construction, and refused to pay for building the dam. (We note that the Road Commissioner did this after having invoiced the Conservation Commission for the cost of the dam and *after having received from the Conservation Commissioner the monies to be paid to the contractor* for the dam construction.)

What Appellees are in essence suggesting is that Appellants *abandon the judicial forum* and submit the protection of their constitutional rights to the *whim and caprice of the political arena. This is no remedy at all.* A recommendation by the Attorney General in his *discretion* to be *made* or *denied,* for a legislative *gratuity,* in the Legislature's *discretion,* to be *given* or *withheld,* is not due process of law and not a substitute for a court of justice.

The constitution which guarantees Appellants' rights, likewise insures them the privilege of having those rights *judicially declared and protected. Lawrence* v. *State Tax Commission,* 286 U.S. 276.

2. The Remedy By Mandamus As Appellees Suggest Pro Hac Vice On This Motion To Dismiss, Has Already Been Ruled Upon By The Trial Court And Decided Adversely To Appellants

But for the State's asserted immunity, Appellants' declaratory judgment proceeding was an appropriate remedy *encompassing every procedural remedy* available to Appel-

lants. Rule 57 of the West Virginia Rules of Civil Procedure, entitled "Declaratory Judgments" (Jurisdictional Statement, Appendix C, p. 10a), provides that "the existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate". Appellees' Motion to Dismiss in the Trial Court was not grounded on choice or appropriateness of remedy, but solely on the Trial Court's *lack of jurisdiction to afford any remedy to Appellants.* Appellees' statement in their motion herein (p. 3) that "the court did not preclude Appellant Price from any relief but merely told him he was proceeding in a wrong manner", is *completely erroneous.* The basis of the Trial Court's decision does not concern choice of remedies, but *concerns whether any remedy is available to Appellants as against Appellees' interposition* of the State's Constitutional immunity. (Jurisdictional Statement, Appendix A, Letter Opinion of April 13, 1964, p. 1a). The Trial Court dismissed the proceeding with prejudice. (Jurisdictional Statement, Appendix D thereto, Final Order, p. 11a). *By the Trial Court's application of the immunity provision, Appellants can have no remedy whatsoever.*

The Trial Court's opinion in declining to afford the declaratory remedy and interpret the contract, held it subject to the *"stringent prerequisites"* for a writ of mandamus. (Jurisdictional Statement, Appendix A, Letter Opinion of April 13, 1964, p. 4a). Having undertaken to consider it as a mandamus, it then held that mandamus would not lie because under the archaic concept of mandamus prevailing in this State, Appellants could not show a *clear legal right* (Jurisdictional Statement, Appendix A, Letter Opinion of April 13, 1964, p. 6a), *the very thing Appellants sought to establish on a simple question of law by an interpretation of the contract under the declaratory remedy procedure.*

The suggestion of mandamus by Appellees is *conclusively contradicted* by the Trial Court's own opinion and decision

that mandamus would not lie (Jurisdictional Statement, p. 15; Appendix A thereto, Letter Opinion of April 13, 1964, p. 6a).

For the first time, and on appeal in this Court, Appellees *now* suggest that Appellants should institute proceedings to *require* the Road Commissioner to institute *eminent domain proceedings.*

The state statutes conferring the power of eminent domain upon the State Road Commissioner expressly pertain only to *real estate.* (Chapter 17, Article 2A, Section 8(5), and Article 4, Section 5, Code of West Virginia, 1931, as Amended; same, Michie's West Virginia Code of 1961, Serial Sections 1448(8)(5) and 146, respectively). These statutes relating to eminent domain and the procedure therefor, are clearly tailored for determining the value of interest in land and not for a situation such as is presented by this case which involves the simple interpretation of a contract.

All of the decisions, both state and federal, relied upon by Appellees (Motion to Dismiss, p. 5) pertain to *the condemnation of real estate,* and appurtenances thereto. *There is no West Virginia authority, statutory or otherwise, which supports Appellees' suggestion and the eminent domain statutes are to the contrary.*

If as the Trial Court held, Appellants did not have a clear legal right for mandamus, it is immaterial whether the purpose of the mandamus was to compel the Road Commissioner to audit the claim and perform his statutory duty, or to institute condemnation proceedings under the eminent domain statutes; *for such right in either case would have its genesis in the same facts of the case.*

The inadequacy and inappropriateness of the eminent domain proceeding to afford relief to Appellants is obvious. *But for the interposition and application of the constitutional immunity provision Appellants had a completely*

adequate remedy in the declaratory procedure which was refused them, thereby depriving them of the due process of law.

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted,

CARNEY M. LAYNE
638 Fifth Avenue
Huntington, West Virginia

CHARLES W. YEAGER
608 Kanawha Valley Building
Charleston, West Virginia

JAMES W. ST. CLAIR
523 Seventh Street
Huntington, West Virginia

September 13, 1965.

BLANK PAGE

APPENDIX A

WEST VIRGINIA RULES OF CIVIL PROCEDURE FOR TRIAL COURTS OF RECORD

Adopted and promulgated by order of the Supreme Court of Appeals of West Virginia entered October 13, 1959, effective on and after July 1, 1960, and as contained in 144 W. Va. Reports, p. xcviii.

* * *

RULE 19.

NECESSARY JOINDER OF PARTIES

(a) *Necessary Joinder.* Subject to the provisions of Rule 23 and of subdivision (b) of this rule, persons having a joint interest shall be made parties and be joined on the same side as plaintiffs or defendants. *When a person who should join as a plaintiff refuses to do so, he may be made a defendant or, in proper cases, an involuntary plaintiff.* (Italics supplied).

* * *

END